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THE ADMINISTRATION OF JUSTICE AND THE HUMAN RIGHTS OF DETAINEES: QUESTION OF HUMAN RIGHTS AND STATES OF EMERGENCY

Third annual report and list of States which, since 1 January 1985, have proclaimed, extended or terminated a state of emergency, presented by Mr. Leandro Despouy, Special Rapporteur appointed pursuant to Economic and Social Council resolution 1985/37

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*/ This document is a revised and updated version, for presentation to the Commission on Human Rights at its forty-seventh session, of the documents submitted to the Sub-Commission at its forty-second session (E/CN.4/Sub.2/1989/30/Rev.1 and E/CN.4/Sub.2/1990/33 and Add.1 and 2).

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INTRODUCTION

1. In accordance with Economic and Social Council resolution 1985/37, Mr. Leandro Despouy, Special Rapporteur on States of Emergency, submitted to the Sub-Commission, at its thirty-ninth session in 1987, his first report and a list of States which, since 1 January 1985, have proclaimed, extended or terminated a state of emergency (E/CN.4/Sub.2/1987/19).

2. The revised and updated version of the first report (E/CN.4/Sub.2/1987/19/Rev.1 and Add.1 and 2), together with the second report (E/CN.4/Sub.2/1988/18 and Add.1), were submitted by the Special Rapporteur to the Sub-Commission at its fortieth session in 1988, under item 9 (b) of its agenda (E/CN.4/Sub.2/1988/SR.16/Add.1, paras. 10-17).

3. A revised and updated version of the second report, taking account of new, relevant and reliable information received between 8 August and 6 December 1988, was submitted to the Commission on Human Rights at its forty-fifth session (E/CN.4/Sub.2/1988/18/Rev.1). By its decision 1989/105 of 6 March 1989, the Commission approved the Sub-Commission's request to its Special Rapporteur to continue his work and to submit to the Sub-Commission, at its forty-first session in 1989, his third annual report and list, and to update that report for the forty-sixth session of the Commission in 1990.

4. Since in 1989 the third annual report and annexed list (E/CN.4/Sub.2/1988/30 and Add.1 and Add.2/Rev.1) were submitted for translation and reproduction late (16 August) and hence could not be made available in all the working languages in time for the forty-first session of the Sub-Commission, the revised and updated version of this report prepared for presentation to the Commission on Human Rights at its forty-sixth session (E/CN.4/Sub.2/1989/30/Rev.1) has also been distributed for consideration at the forty-second session of the Sub-Commission. Also distributed was a working paper (E/CN.4/Sub.2/1990/33 and Add.1 and 2) which contained observations and recommendations by the Special Rapporteur concerning the criteria of legality applicable in international law and internal law to guarantee respect for human rights in states of emergency. These observations and recommendations are based on a study carried out by the Special Rapporteur on the development of international law and of the internal law of several countries with regard to the principle of non-discrimination. The Special Rapporteur also presented to the Sub-Commission, in an addendum to this document, an analysis of the new Constitution of Namibia and an updated version of the summary table on South Africa.

5. In its resolution 1990/19, the Sub-Commission, inter alia, invited the Special Rapporteur to continue the work with which he has been entrusted and to submit to the Sub-Commission, at its forty-third session, the next annual report and list updated on the basis of the information received and to update his present report so that the Commission on Human Rights, at its forty-seventh session, has before it the most recent and accurate information available. The present revised and updated version of the third report, which also includes the above-mentioned working paper submitted to the Sub-Commission in 1990, has been prepared in pursuance of that resolution.

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I. METHOD AND PROCEDURE APPLIED BY THE SPECIAL RAPPORTEUR

6. At the Sub-Commission's request, the Special Rapporteur periodically solicits information from all concerned Governments, United Nations organs, specialized agencies, other intergovernmental organizations and non-governmental organizations in consultative status with the Economic and Social Council. His latest letter requesting information was dated 28 November 1990.

7. The Special Rapporteur also receives, for his consideration, reliable information from university professors, contributors of articles and associations that is sent to him care of the United Nations Centre for Human Rights at Geneva.

8. The Special Rapporteur and, at his request, the Secretariat, may contact the Government of a State concerned to obtain clarifications, for instance, on the dates of proclamation, extension or termination of a state of emergency, the dates of notifications, the impact on human rights of the measures taken, etc.

9. When information on states of emergency in force or recently proclaimed, extended or terminated is received, after verification it is summarized in the form of summary tables following the model adopted in the first two reports. These tables and clarifying remarks of the Special Rapporteur are included in the annexes to this report.

10. When information supplied by non-governmental organizations in consultative status with the Economic and Social Council alleges violations of human rights linked to emergency measures taken by a Government, it is examined in the light of any other available information and then presented in the form of a summary table accompanied by remarks. The Special Rapporteur may send a copy of such material to the Government concerned for any comments or corrections it might wish to make. Any such comments or corrections received are transmitted to the organizations concerned so that they can furnish any additional information. On the basis of the information thus collected, the Special Rapporteur may decide to publish the summary table accompanied by the remarks he deems appropriate, particularly on the possible impact of the emergency measures taken on respect for human rights, especially inviolable rights such as the right to life and the prohibition of torture and other cruel, inhuman or degrading treatment or punishment.

11. This procedure was followed, in particular, in the case of the information received by the Rapporteur concerning the situation in South Africa (see annex I below). The Special Rapporteur sent the Government a summary of the information received from various non-governmental organizations in consultative status with the Economic and Social Council. This summary was prepared before the second report was submitted to the Sub-Commission in 1988, but the Special Rapporteur refrained from publishing it in that report so as to leave the Government the necessary time to formulate any comments and proposed corrections concerning the Special Rapporteur's description of the legal situation regarding the state of emergency in that country. The Government transmitted its reply in September 1988, which was unfortunately too late for distribution in time to the Sub-Commission under the item of its agenda concerning the question of human rights and states of emergency. This reply was reproduced twice: in E/CN.4/Sub.2/1989/30/Add.1 and later in

E/CN.4/Sub.2/1989/30/Rev.1. Annex I below includes a summary table of the legal situation as at 1 December 1990, together with information of non-governmental origin which has been summarized by the Special Rapporteur.

12. Should a Government take too long to reply to information of non-governmental origin transmitted to it by the Special Rapporteur in this manner, the Special Rapporteur reserves the possibility of publishing that information after verification. Thus, the Special Rapporteur very much hopes to obtain the co-operation of Governments, which are the best sources of official information.

13. Information from intergovernmental organizations and non-governmental organizations is also extremely important for giving the Special Rapporteur a realistic view of the situation, particularly concerning the impact of emergency measures on respect for human rights.

14. The Special Rapporteur is therefore grateful to the secretariat of the Inter-American Commission on Human Rights for sending him copies of the notifications received from States parties to the American Convention on Human Rights which have invoked states of emergency pursuant to article 27 of the Convention.

15. As regards non-governmental organizations, the Special Rapporteur wishes to convey particular thanks to Amnesty International, the International Association of Democratic Lawyers, the International Commission of Jurists, the International Fellowship of Reconciliation, the International Human Rights Law Group, the Inter-Parliamentary Union and Pax Romana for the precise information they transmitted to him. In view of the considerable amount of verification which this study involves as regards both the legal and factual situation, he sincerely hopes that he will continue to receive information from these and other concerned organizations, particularly other organizations of jurists, judges or lawyers. The Special Rapporteur also wishes to pay a deserved tribute to the press for its contribution to informing world public opinion on this subject and for the often reliable and always useful information with which it has provided him.

16. In preparing his third report, the Special Rapporteur entered a new phase of his study which required greater co-operation from the Governments concerned in that he specifically approached them when an emergency situation likely to have an impact on respect for human rights, particularly inviolable rights, was drawn to his attention on the basis of reliable information communicated by non-governmental organizations in consultative status with the Economic and Social Council or published in the press.

17. The Special Rapporteur is pleased by the favourable reception given to his requests by the Governments which he has contacted since the start of 1989. He hopes that the Governments to which he has already sent and will be sending a summary table and remarks concerning impact on human rights - particularly respect for inviolable rights - will provide him with additional information, especially Governments which have maintained a state of emergency in force for many years.

II. PRESENT SITUATION REGARDING STATES OF EMERGENCY

A. Situation since 1 January 1985

18. By drawing up a list of States which have proclaimed, extended or terminated a state of emergency - a list which has appeared in his reports since August 1987 - the Special Rapporteur, within the limits of the information available to him, has endeavoured to give the Sub-Commission and the Commission as complete a picture as possible of the world situation regarding states of emergency since 1 January 1985.

19. Since November 1988, when his second updated report was issued, the Special Rapporteur has received from Governments or non-governmental organizations in consultative status with the Economic and Social Council, or else has read in the press, information concerning the proclamation, extension, maintenance or termination of a state of emergency in various States.

B. States of emergency in force, proclaimed or extended since November 1988

20. According to this information, since November 1988, some 33 States have proclaimed or extended a state of emergency, or continued to take emergency measures, in respect of all or part of the territories under their jurisdiction or control.

21. In the case of 21 of these States, the Special Rapporteur has received official information, sometimes supplemented by information from other sources, as follows:

Algeria: Letter from the Government dated 28 April 1989 on the state of siege decreed on 6 October 1988 (see also section C below, concerning terminations);

Argentina: Letter from the Government dated 6 June 1989, concerning the proclamation of a nation-wide state of siege for 30 days (see also section C below, concerning terminations);

Bolivia: Notification of the Government to the United Nations Secretary-General dated 16 November 1989, pursuant to article 4 of the International Covenant on Civil and Political Rights, concerning the proclamation of a state of emergency throughout Bolivia from 15 November 1989 (see also section C below, concerning terminations);

Brunei Darussalam: Information received from the Government on 21 March 1989, and also from a non-governmental organization, concerning the extension of Emergency Orders every two years since 1962; another letter dated 18 August 1989 explaining that the state of emergency has to be extended from time to time;

Canada: Letter from the Government dated 24 August 1989, communicating information from the Government of Manitoba that it had declared a state of emergency throughout the province on 23 July 1989 because of major forest fires threatening the safety, health and welfare of the population; the state of emergency was ended on 4 August 1989 (according to the Emergency Measures Act, a state of emergency can be declared for a

renewable period of two weeks; the measures taken dealt with the control, authorization or prohibition of travel to the region; through them some 23,000 persons were evacuated);

China: Letter from the Government dated 8 May 1989, concerning the imposition of martial law in Lhasa, Tibet, on 8 March 1989; letter from the Government, dated 15 August 1959, concerning the imposition of martial law in Beijing on 20 May 1989; information published in the press and other information received from non-governmental organizations, which will be analysed and transmitted to the Government for comments, as necessary;

Colombia: Letter from the Government dated 18 April 1989, concerning the continuation of the state of emergency in force since 10 May 1984;

Jordan: In its second periodic report dated 18 December 1989, submitted for consideration by the Human Rights Committee (document CCPR/C/46/Add.4), the Government of Jordan reported that the declaration of the state of emergency was necessitated by the state of war with Israel, which is still continuing, and that the present time could not be regarded as appropriate for the abolition of the state of emergency (para. 23). In an addendum to its initial report dated 22 January 1982 (document CCPR/C/1/Add.56), the Government indicated that martial law was declared in the country in 1957, but its provisions were not applied over a long period, since they were revoked in 1958 and were not reimposed until 1967;

El Salvador: See annex I;

Pakistan: Letters from the Government dated 24 October and 5 December 1989, giving notice of the proclamation of a state of emergency on 17 August 1988 because of the serious emergency situation threatening the security of the country as a result of external aggression and internal disturbances which the provincial government authorities were unable to control, and subsequently of its termination on 1 December 1988, because the reasons for the proclamation had ceased to exist; none of the emergency powers provided for in articles 232 and 233 of the Constitution were used by the President or by the Federal Government;

Panama: Letter from the Government dated 25 October 1989 advising that a state of emergency was last proclaimed on 10 June 1987 for a period of 19 days; the following day the Government notified the United Nations Secretary-General and the OAS Secretary-General, pursuant to article 4 of the International Covenant on Civil and Political Rights and article 27 of the American Convention on Human Rights;

Peru: Notifications of the Government to the United Nations Secretary-General dated 5 January, 6 March, 4 May, 2 and 14 August 1989 and 7 June 1990 pursuant to article 4 of the International Covenant on Civil and Political Rights, concerning the extension of states of emergency in certain provinces and the declaration of a state of emergency in some other provinces; letters dated 7 March, 4 May, 2 August and

26 and 31 October 1989 referring to the extension of the state of emergency in several provinces and departments; information received from non-governmental organizations;

Singapore: Letter from the Government dated 18 August 1989, concerning administrative detentions under the Internal Security Act and the adoption of the Internal Security (Amendment) Bill of 25 January 1989;

South Africa: Information received from the Government and non-governmental organizations and published in the press (cf. annex I); information received from the Government on 6 July 1989 (cf. E/CN.4/Sub.2/1989/45); and additional information received from non-governmental organizations which will be analysed and transmitted to the Government for comments, as necessary;

Territories occupied by Israel: United Nations reports and information received from non-governmental organizations on the emergency legislation in force; in a letter dated 14 August 1989, the Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) recalled that UNRWA had been operating under de facto emergency conditions in the occupied territories and in Lebanon; the effects of those conditions on the Palestinian refugees and on the services that UNRWA could provide them were mentioned in his reports to the General Assembly (A/43/13 and A/44/13 and Add.1);

Turkey: Letter from the Government dated 19 July 1988, containing a general statement; information received from a non-governmental organization in July 1988, reporting that the state of emergency was being maintained in nine provinces;

Union of Myanmar: Letter from the Government dated 16 May 1989, concerning the declaration of a state of emergency at Prome on 22 July 1988 and in the Yangon (Rangoon) region on 3 August 1988, following public disturbances; information communicated by non-governmental organizations; information published in the press (see also section C below, concerning terminations);

Union of Soviet Socialist Republics: Notifications of the Government to the United Nations Secretary-General dated 15 and 19 January 1990, pursuant to article 4 of the International Covenant on Civil and Political Rights, concerning the proclamation of a state of emergency from 15 January 1990 in the Nagorno-Karabakh autonomous region and certain other areas, and concerning the declaration of a state of emergency from 20 January 1990 in the city of Baku; notification of the Government dated 23 March 1990 concerning the declaration of a state of emergency and imposition of a curfew in Dushanbe (Tadzhik SSR); information published in the press referring to the proclamation of a state of emergency on 7 June 1990 in Frunze (Kirghiz SSR) (see also section C below, concerning terminations); and information published in the press referring to the declaration of a state of emergency on 26 October 1990 in several southern districts of SSR Moldova;

United Kingdom of Great Britain and Northern Ireland: Letter from the Government dated 5 January 1989, transmitting a copy of the notification to the United Nations Secretary-General dated 23 December 1988, pursuant to article 4 of the International Covenant on Civil and Political Rights, indicating that the Government found it necessary to continue to exercise, in relation to terrorism connected with the affairs of Northern Ireland, measures derogating in certain respects from its obligations under article 9 of the Covenant; communication from the Government received by the Secretary-General on 18 December 1989 indicating that the derogation notified under article 4 of the Covenant would remain in place for as long as circumstances require; information from a non-governmental organization; information appearing in the press and other publications;

Venezuela: Information communicated by the Government on 3 April 1989 concerning the suspension, on 28 February 1989, of certain constitutional guarantees (see also section C below, concerning terminations);

Yugoslavia: Letter from the Government dated 16 May 1989 transmitting the notification sent to the United Nations Secretary-General, pursuant to article 4 of the International Covenant on Civil and Political Rights, concerning special measures in force since 10 April 1989, suspending freedom of assembly and freedom of movement between 8 p.m. and 5 a.m. in the province of Kosovo, in derogation from articles 12 and 21 of the Covenant; letter dated 15 June 1989 concerning further information on derogations from freedom of assembly; see also section C below, concerning terminations; letter dated 11 August 1989, transmitting a statement by Dr. Zelenovic, member of the Presidency of the Socialist Federal Republic of Yugoslavia, which indicated, inter alia, that since the political situation and the matter of security were still complex in certain places, the Presidency of the Republic considered that a number of measures introduced previously should remain in force for some time, for example the ban on assembling for the purpose of demonstrating as well as the updating of plans for the prevention and elimination of emergency conditions; notification of the Government to the United Nations Secretary-General dated 19 March 1990, pursuant to article 4 of the International Covenant on Civil and Political Rights, advising that as of 21 February 1990 and owing to the escalation of disorders which had led to the loss of human lives, the movement of persons in Kosovo was prohibited from 9 p.m. to 4 a.m., thereby derogating from article 12 of the Covenant; and that public assembly was prohibited for the purpose of demonstration, thereby derogating from article 21 (see also section C below, concerning terminations);

22. With regard to 12 other States, the Special Rapporteur has received from non-governmental organizations, or read in the press, information regarding which he would like to receive confirmation from the Governments concerned. Requests for information have been or will be addressed to those Governments.

23. The Special Rapporteur is aware of the possibility that the existence of a state of emergency in other countries might not have come to his knowledge and trusts that the co-operation of States and intergovernmental and non-governmental organizations in the procedure being applied will soon enable him to give a full account of the situation worldwide.

C. States of emergency terminated or ended since November 1988

24. The information received indicates that since November 1988, 13 States have announced the termination or ending of states of emergency or the restoration of suspended constitutional or legal freedoms. The following are the States in question:

Algeria: In a letter dated 28 April 1989, the Algerian Government informed the Special Rapporteur of the termination of the state of siege at 6 a.m. on 12 October 1988;

Argentina: In a letter dated 11 July 1989, the Argentine Government indicated that on 27 June 1989 the President of the Republic had lifted the state of siege throughout the national territory;

Bolivia: Through a notification dated 18 March 1990, addressed to the Secretary-General of the United Nations, pursuant to article 4 of the International Covenant on Civil and Political Rights, the Government indicated that the state of emergency had ceased as of 15 February 1990;

Chile: In a letter dated 10 August 1989, the Chilean Government transmitted to the Special Rapporteur a copy of Supreme Decrees of the Ministry of the Interior, Nos. 1197 and 1198 of 24 August 1988, terminating the states of emergency in force at that time (the state of emergency and the state of danger of disturbance of internal peace); the Government explained that with the end of those states of emergency, the constitutional provisions concerning fundamental rights and freedoms were fully re-established; the Government added, in particular, that on 30 July 1989, 54 amendments to the Political Constitution of the State were adopted by referendum, among which were provisions amending article 41, concerning states of emergency; this revision eliminated certain powers available to the Executive as regards the declaration of a state of siege, the possibility of expelling persons from the national territory (thus ending exile as an administrative penalty) and the possibility of preventing certain persons from entering and leaving the territory, of limiting the exercise of freedom of association and freedom to form trade unions and of censoring correspondence and communications;

El Salvador: See annex I;

Fiji: In letters dated 6 November and 7 December 1989, the Government informed the Special Rapporteur that the state of public emergency, which had been in force since 14 May 1987, was terminated on 5 December 1987;

Haiti: The Haitian Government informed the Secretary-General, in a letter dated 16 March 1989, that the 1987 Constitution had been brought back into force, but according to other information communicated by the Government, about 30 articles of the Constitution remain suspended, the executive power is being exercised by the President of the military Government until the President-elect is sworn in and the legislative power is temporarily being exercised by the executive power;

Senegal: According to information communicated by the Government, on 20 May 1988, the Senegalese authorities lifted the state of emergency proclaimed in the Dakar region on 29 February 1988 as a result of acts of vandalism and looting that followed the presidential elections of 27 February 1988; according to the Government, the state of emergency only restricted freedom of movement between midnight and 5 a.m.; a state of emergency was again declared in the Dakar region on 28 April 1989 after incidents between Mauritania and Senegal, on the grounds that the physical integrity of Mauritanian nationals was obviously endangered and that they had to be placed under the protection of the forces of law and order; the state of emergency was lifted on 19 May 1989, when the situation returned to normal and the Mauritanians were repatriated; the Government asserted that in this case also, the state of emergency only restricted freedom of movement between 10 p.m. and 5 a.m. and added that it would transmit to the Special Rapporteur the texts of all provisions both introducing and terminating the two states of emergency mentioned above;

Sri Lanka: Through a notification of 13 January 1989 addressed to the United Nations Secretary-General, pursuant to article 4 of the International Covenant on Civil and Political Rights, the Government indicated that the President of Sri Lanka, in exercise of powers granted to him by law, had terminated the state of emergency through a proclamation dated 11 January 1989;

Union of Myanmar: In a letter dated 17 August 1989, the Government indicated that the state of emergency was terminated on 24 August 1988; in letters dated 26 January, 7 May and 17 June 1990, the Government provided additional information with regard to the lifting of martial law in altogether 102 townships by end of May 1990;

Union of Soviet Socialist Republics: According to official information published in the press, on 21 November 1990 the president of the Kirghiz SSR had lifted the state of emergency proclaimed in the city of Frunze on 7 June 1990;

Venezuela: In a letter dated 18 April 1989, the Government indicated that it was ending the suspension of certain constitutional provisions;

Yugoslavia: In a letter dated 15 June 1989, the Government sent a copy of the notification made under article 4 of the International Covenant on Civil and Political Rights, whereby the Government informed the other States parties that it was ending the derogation affecting freedom of movement (article 12 of the Covenant) in the province of Kosovo, with effect from 21 May 1989; through a notification of 24 April 1990, addressed to the United Nations Secretary-General, pursuant to article 4 of the International Covenant on Civil and Political Rights, the Government indicated that the state of emergency in the province of Kosovo had ceased to exist with effect from 18 April 1990.

D. Other information

25. The Special Rapporteur is continuing to receive information from States concerning changes in their internal law on states of emergency. Thus, on 10 August 1989, he received a letter from the Government of Portugal informing him of amendments to article 19 of the Constitution, recently revised by the National Parliament. Such information is very useful to the Special Rapporteur in his work on model legal provisions and his analysis of the development of international customary law. The Special Rapporteur has also received relevant constitutional, legislative and administrative texts from the Governments of Algeria, Brunei Darussalam, Canada, Chad, Chile, China, Colombia, Cyprus, Czechoslovakia, the Dominican Republic, Finland, Guatemala, Malta, Mauritius, Mexico, Morocco, Pakistan, the Philippines, Spain, the Union of Soviet Socialist Republics, Uruguay, Venezuela and Yemen.

26. The Special Rapporteur has received the following information:

Cuba: In a letter dated 14 September 1989, the Government indicated that no state of emergency had been proclaimed in that country since 1959;

Cyprus: In a letter dated 20 September 1989, the Government indicated that since 1 January 1985 no state of emergency had been proclaimed or extended in Cyprus, despite the foreign military occupation of part of its territory;

Czech and Slovak Federal Republic: In a letter dated 21 November 1989, the Government indicated that its legislation had not been amended since the response given in its previous communication of 12 December 1987;

Lebanon: In a letter dated 28 August 1989, the Government indicated that unfortunately it was not currently in a position to provide any information or comments because of the situation in the country (see also the reference in paragraph 19 above under "Territories occupied by Israel" to the communication from UNRWA);

Saudi Arabia: In a letter dated 25 July 1989, the Government indicated that no state of emergency had been proclaimed in that country either before or after 1985;

Yemen: In two letters dated 25 July 1989 and 25 October 1989, the Government indicated that a state of emergency had last been proclaimed in 1978 and that it had been terminated the same year;

Tunisia: In a letter dated 15 August 1989, the Government indicated that since 1 January 1985, no state of emergency had been proclaimed or terminated;

Zimbabwe: In a letter dated 10 August 1990, the Permanent Mission of Zimbabwe acknowledged the receipt of the request for information regarding the extension and termination of a state of emergency in Zimbabwe and stated that any response from the appropriate authority will be communicated to the Special Rapporteur;

High Commissioner for Refugees: In a letter dated 10 August 1989, the United Nations High Commissioner for Refugees (UNHCR) stated that the implications of states of emergency for the enjoyment of human rights are of clear significance in the refugee context. Violations of non-derogable rights can amount to persecution in the refugee context, causing the victims to flee their countries and seek asylum as refugees. A state of emergency in a country of asylum may also negatively impinge on refugee protection where it leads to curtailment of basic rights. A refugee is often clearly in a more vulnerable position than nationals in this regard. UNHCR has the mandate of providing international protection and of seeking permanent solutions for the problem of refugees. In situations caused by states of emergency, such as those mentioned above, this mandate is evidently not easy to fulfil. For these reasons, therefore, it welcomes this initiative of the Sub-Commission which should underpin its efforts to promote and protect the rights of refugees.

Council of Europe and Organization of American States: The Special Rapporteur wishes to thank the Directorate of Human Rights and the Directorate of Legal Affairs of the Council of Europe as well as the Executive Secretary of the Inter-American Commission on Human Rights for having transmitted to him copies of notifications of derogations communicated to their Secretaries-General in accordance with article 15 of the European Convention on Human Rights and article 27 of the Inter-American Convention on Human Rights.

III. REMARKS AND OBSERVATIONS

27. The task before the Special Rapporteur is to verify the large volume of information concerning the states of emergency mentioned above. Most of this material requires a considerable amount of fact-checking and legal analysis with regard to States' responsibility in respect of their international obligations in this field and regarding compliance with all the inviolable rights (right to life, prohibition of torture, etc.) in all countries and at the highest levels of responsibility (executive powers, analysis of constitutional provisions, etc.). This work, which no organization but the United Nations is in a position to undertake, is already considerable and can only go on expanding, in view of the recent marked increase in Governments' interest in this study.

28. However, with the exception of the information on South Africa, which required two years of study, and on El Salvador, which appears in annex I, the Special Rapporteur has not been able to provide the Sub-Commission in this report, for each of the countries considered, with: (a) a detailed account of the reasons for the establishment, extension or termination of the states of emergency; (b) particulars of the rights affected by the emergency measures; and (c) an assessment of the impact of those measures on human rights. Nevertheless, he intends to do so in his reports to the Sub-Commission at its forthcoming sessions.

29. Given the increased burden on the Secretariat and the modest means made available for his study until now, the Special Rapporteur does not have all the assistance he needs to fulfil his obligations. Adequate assistance would mean, at the minimum, the availability of permanent human resources and, if possible, an increase in such assistance, as well as data-processing equipment

for his own use. To fulfil the task entrusted to him, therefore, the Special Rapporteur needs the Secretariat's full assistance, pursuant to Commission on Human Rights decision 1989/105.

IV. MODEL LEGAL PROVISIONS APPLICABLE IN EMERGENCY SITUATIONS

30. In his next report, the Special Rapporteur intends to present some model legal provisions that can serve as a reference for States so that their internal legislation on the state of emergency and its implementation will not have a negative impact on human rights and will meet the criteria of lawfulness deriving from the relevant norms of public international law.

31. To this end, the Special Rapporteur would appreciate receiving the preliminary views of the Sub-Commission and the Commission on those of the criteria set out below which they consider to be the most important.

32. With respect to states of emergency, there clearly exists an international legal framework deriving from prevailing international norms, the practice of international organizations and the internal law of States, which provides a frame of reference for the lawfulness of states of emergency. However, on the basis of the information submitted to him, the Special Rapporteur believes that this legal framework is rarely respected.

33. The Special Rapporteur is of the opinion that if, when it proclaims a state of emergency, a State satisfies the criteria of lawfulness derived from that legal framework, then the adverse consequences that the existence of that state of emergency entail for the enjoyment of human rights as a whole are necessarily limited.

34. Accordingly, the Special Rapporteur proposes the establishment of standard criteria and legal provisions (see his second report) based on the following points, which were widely developed in his previous reports:

(a) The emergency situation capable of giving rise to the proclamation of a state of emergency should be clearly defined and delimited by the Constitution, the law or jurisprudence and, regardless of the phraseology employed, the existence of a real and imminent public danger should be clearly specified;

(b) It is essential that the de facto situation exhibiting these characteristics should be publicly announced and also reflected in the legal form of the state of emergency, in order to ensure that the population is informed of the restrictions imposed on its rights and freedoms;

(c) The emergency measures taken should be commensurate with the emergency situation for which they are intended;

(d) The part of the territory in which the emergency measures are to be applied should also be commensurate with the geographical extent of the emergency situation and should be officially specified;

(e) Domestic legislation should clearly specify which rights permit of derogation and which rights do not permit of derogation and must be respected in all circumstances; the Special Rapporteur proposes to draw up a list of those inviolable rights on the basis of the various international and regional instruments and international customary law concerning human rights, in order to provide States with a form of guideline to which they can refer;

(f) In all cases, there should be a monitoring mechanism, which could be either parliamentary, upon the proclamation or extension of a state of emergency, or judicial, for the assessment of measures taken against individuals;

(g) By providing for the legal liability of the State, it would be possible to compensate persons who have suffered under emergency measures. This would serve to prevent misuse of the measures.

35. The Special Rapporteur believes that, in order to minimize the adverse effects of the existence of a state of emergency on the enjoyment of human rights, it is particularly important that States should endeavour:

(a) To avoid both a legal vacuum and conflicting legislation;

(b) To maintain the powers of the non-military courts and limit the competence of military courts to military crimes and offences;

(c) To maintain the procedural guarantees: in particular, habeas corpus, amparo and other remedies having the same purpose should in no circumstances be suspended;

(d) To avoid any de facto state of emergency (i.e. a situation in which emergency measures are taken without an official proclamation or in which, after a state of emergency has been officially repealed, exceptional measures are nevertheless maintained). De facto states of emergency, like the adoption of excessive measures during an emergency situation, have an extremely adverse effect, not only on the country's internal legal order but also in respect of the most fundamental human rights. Note should also be taken of another serious problem, which the Special Rapporteur proposes to analyse in depth, that exists in some countries, where persons can be arrested and detained, sometimes for very long periods, without a state of emergency having been proclaimed.

36. The establishment of standard legal provisions as a guideline is thus one way of encouraging States to respect human rights and fulfilling the mandate entrusted to the Special Rapporteur by the Commission on Human Rights, under which he is to propose to the Sub-Commission, for transmittal to the Commission, measures designed to ensure respect throughout the world of human rights and fundamental freedoms in situations where states of siege or emergency exist, especially of those rights referred to in article 4 (2) of the International Covenant on Civil and Political Rights, namely the inviolable rights not permitting of derogation in any circumstances whatsoever.

V. CRITERIA CONCERNING THE LEGALITY OF THE STATE OF EMERGENCY: THE PRINCIPLE OF NON-DISCRIMINATION

A. Criteria concerning legality in international law

37. At a time when the United Nations is implementing the second part of the programme of action for the Second Decade to Combat Racism and Racial Discrimination (see resolution 38/14 adopted by the General Assembly on 22 November 1983), the Special Rapporteur would like to stress the importance of the principle of non-discrimination, which Mrs. Nicole Questiaux (E/CN.4/Sub.2/1982/15, paras. 64-66) and the Special Rapporteur himself (E/CN.4/Sub.2/1985/19, para. 22) have emphasized in connection with the question of human rights and states of emergency.

38. As far back as 1949, article 3 common to the four Geneva Conventions, applicable to periods of armed conflict, provided that the persons protected by the Conventions should "in all circumstances, be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria".

39. Although such a safeguard clause was not included in the European Convention on Human Rights (article 15), when it was adopted in 1950, it apparently should be understood as being implicit, since article 14 of the Convention, which prohibits any discriminatory measures, applies generally to the exercise of all the rights and guarantees recognized by the Convention, including those from which no derogation is permitted, which are listed in article 15.

40. In 1966, the International Covenant on Civil and Political Rights explicitly made the principle of non-discrimination (in article 4, para. 1) one of the conditions for exercising the right it grants States parties to derogate from certain of its provisions under exceptional circumstances.

41. This trend was confirmed in 1969 by the text of article 27 of the American Convention on Human Rights.

42. The first Protocol additional to the Geneva Conventions of 1949 further strengthened this trend by using terms comparable to article 3 common to the four Geneva Conventions, with some additions: "without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria".

43. In 1982, Mrs. Questiaux had emphasized the fact that the International Covenant (article 4, para. 1) and the American Convention (article 24, para. 1) used similar terms to indicate that the measures taken under the right of derogation should not involve discrimination based solely 1/ on race, colour, sex, language, religion or social origin.

44. The fact that the prohibition of any form of discrimination is not included among the rights from which no derogation is permitted, as enumerated in article 4, paragraph 2, of the Covenant and article 27, paragraph 2, of the American Convention, should not stand in the way of implicit recognition of the fact that the principle of non-discrimination is one from which no derogation is permitted. The position given to the statement of this

principle in the text (in para. 1 of the article in question) and the strength of the terms used indicate the intention of the drafters of these two international instruments to treat the principle of non-discrimination as an essential condition for the exercise of the right of derogation they grant to the States parties. 2/

B. Criteria concerning legality in internal law

45. The Special Rapporteur suggests that all States should incorporate in their constitutional or legislative order provisions guaranteeing the principle of non-discrimination and making it a right from which no derogation is permitted, even in time of emergency.

1. Analysis of the Constitution of Namibia

46. The Special Rapporteur has closely followed the developments that have taken place in Namibia since his first report (E/CN.4/Sub.2/1987/19/Rev.1 and Add.1 and 2). He received, inter alia, relevant information on this question from the United Nations Commissioner for Namibia (letter dated 30 November 1987) and document A/42/24 (Part I); report of the United Nations Council for Namibia; letter dated 17 August 1988 and documents A/AC.131/284 (Political developments related to Namibia) and A/AC.131/285 (Social conditions in Namibia). The Special Rapporteur has based the current analysis on the original English text of the new report by the Secretary-General on the implementation of Security Council resolution 435 (1978) concerning the question of Namibia (S/20967/Add.2), which contains the definitive text of the Constitution as adopted on 9 February 1990 by the Constituent Assembly of Namibia.

47. One of the main problems the Special Rapporteur has identified since the beginning of his work is that of the deterioration of respect for human rights during states of emergency. In general, when internal law contains no provisions to guarantee the maintenance of respect for human rights in such situations, the Special Rapporteur attaches a great deal of importance, on the one hand, to the adoption of new rules governing the state of emergency or the amendment of existing rules and, on the other, to the fact that such new or revised rules should be based on the principles and criteria concerning the legality of states of emergency defined by Mrs. Questiaux in her study contained in document E/CN.4/Sub.2/1982/15 (paras. 42-72) and by the Special Rapporteur himself in his explanatory paper (E/CN.4/Sub.2/1985/19, paras. 18-23).

48. With regard to the Constitution of Namibia, the Special Rapporteur is of the opinion that the content of its provisions is a good example of legal mastery of the problem. Although the Constitution is to be welcomed in several respects, the Special Rapporteur will refer only to that concerning the state of emergency, as considered in the light of international principles and criteria.

49. Chapter 4 of the Constitution is entitled "Public emergency, state of national defence and martial law". It consists of one article (26) entitled "State of emergency, state of national defence and martial law". Chapter 3 relates to fundamental human rights and freedoms and contains an article 24 entitled "Derogation".

Principles of legality and proclamation

50. According to article 26, paragraph (1), of the Constitution of Namibia, "the President may by Proclamation in the Gazette declare that a state of emergency exists in Namibia or any part thereof".

51. According to article 26, paragraph (7), the President has the power to proclaim or terminate martial law.

Principle of notification

52. At the time the present document was being prepared, Namibia had not ratified or acceded to the International Covenant on Civil and Political Rights and therefore had no obligation to notify the Secretary-General of the United Nations under article 4 of the Covenant. However, in accordance with the practice followed by a number of States in a similar situation, the Special Rapporteur would appreciate being notified if the President of the Republic of Namibia one day decided to proclaim a state of emergency.

Principle of exceptional threat

53. The state of emergency may be declared in three crisis situations, under two circumstances: at a time of national disaster or during a state of national defence or public emergency threatening the life of the nation or the constitutional order.

54. Martial law may be proclaimed only when a state of national defence involving another country exists or when civil war prevails.

Powers of the Executive and principle of proportionality

55. The principle of proportionality is based on the theory of self-defence: the measures taken to ensure protection against an imminent danger must be proportionate to the danger.

56. According to that principle, it has to be determined, derogation by derogation and both in time and in space, whether the measures of restriction or suspension enacted go beyond the strict limits required by the situation. To this end, it must be asked whether the measures admissible in normal times would not have been sufficient, whether the emergency measures really make it possible to abate or bring to an end the specific situation of danger and, when ordinary guarantees have been suspended, whether extra-judicial replacement guarantees have been introduced (see Questiaux, op.cit. supra, paras. 60-63).

57. Article 26, paragraph (5), of the Constitution provides that, during a state of emergency in terms of that article or when a state of national defence prevails, the President has the power by Proclamation to make such regulations as in his or her opinion are necessary for the protection of national security, public safety and the maintenance of law and order, including a regulation to suspend the operation of any rule of the common law or statute or any fundamental right or freedom protected by the Constitution for such period and subject to such conditions as are reasonably justifiable for the purpose of dealing with the situation which has given rise to the emergency.

58. Where any such regulation provides for detention without trial, an Advisory Board is appointed by the President on the recommendation of the Judicial Service Commission and consists of no more than five persons, of whom no fewer than three must be judges of the Supreme Court or the High Court or qualified to be such. The functions of the Advisory Board are set out in article 24, paragraph (2) (c).

Principle of temporariness

59. According to article 26, a declaration of a state of emergency, if not sooner revoked, ceases to have effect: (a) seven days after its publication if it was made when the National Assembly was sitting or had been summoned to meet; and (b) in any other case, at the expiration of a period of 30 days after its publication.

60. Before the expiration of those periods, however, the state of emergency may be extended by a resolution adopted by a two-thirds majority of all the members of the National Assembly. In such a case, the state of emergency is extended by the period specified in the resolution or for not more than six months.

61. The National Assembly may at any time adopt a resolution revoking the state of emergency.

62. Any regulation made by the President pursuant to article 26, paragraph (5), ceases to have legal force if it has not been approved by a resolution of the National Assembly within 14 days of the date when the National Assembly first sits in session after the entry into force of that regulation.

63. The President has the power to terminate martial law. However, martial law automatically ceases to be valid if it is not approved within a reasonable time by a resolution adopted by a two-thirds majority of the members of all the National Assembly.

Principles of intangibility and non-discrimination

64. Under paragraph (3) of article 24 dealing with derogations, nothing contained in that article can permit a derogation from or suspension of the fundamental rights or freedoms referred to in articles 5 (Protection of fundamental rights and freedoms), 6 (Protection of life), 8 (Respect for human dignity), 9 (Slavery and forced labour), 10 (Equality and freedom from discrimination), 12 (Fair trial), 14 (Family), 15 (Children's rights), 18 (Administrative justice), 19 (Culture) and 21 (1) (a), (b), (c) and (e) (Freedom of speech and expression, including freedom of the press and other media; freedom of thought, conscience and belief, including academic freedom in institutions of higher learning; freedom to practise any religion and to manifest such practice; and freedom of association, including freedom to form and join trade unions and political parties) or the denial of access by any persons to legal practitioners or a court of law.

65. Article 24 also provides that:

"Article 24 Derogation

(1) Nothing contained in or done under the authority of Article 26 hereof shall be held to be inconsistent with or in contravention of this Constitution to the extent that it authorises the taking of measures during any period when Namibia is in a state of national defence or any period when a declaration of emergency under this Constitution is in force.

(2) Where any persons are detained by virtue of such authorisation as is referred to in Sub-Article (1) hereof, the following provisions shall apply:

(a) they shall, as soon as reasonably practicable and in any case not more than five (5) days after the commencement of their detention, be furnished with a statement in writing in a language that they understand specifying in detail the grounds upon which they are detained and, at their request, this statement shall be read to them;

(b) not more than fourteen (14) days after the commencement of their detention, a notification shall be published in the Gazette stating that they have been detained and giving particulars of the provision of law under which their detention is authorised;

(c) not more than one (1) month after the commencement of their detention and thereafter during their detention at intervals of not more than three (3) months, their cases shall be reviewed by the Advisory Board referred to in Article 26(5)(c) hereof, which shall order their release from detention if it is satisfied that it is not reasonably necessary for the purposes of the emergency to continue the detention of such persons;

(d) they shall be afforded such opportunity for the making of representations as may be desirable or expedient in the circumstances, having regard to the public interest and the interests of the detained persons."

Notes

1/ The word "solely" should be interpreted as permitting the taking of measures strictly required by the state of emergency against a part of the population (e.g. the quelling of a riot; see study by Nicole Questiaux, para. 65). See also Annotations on the text of the draft International Conventions on Human Rights prepared by the Secretary-General (A/2929), para. 44: "The third condition concerning non-discrimination also met with general approval, although there was some debate on the inclusion of the word 'solely'. For the retention of that word, it was argued that a State might take measures derogating from the rights recognized in the Covenant that could be construed as discriminatory merely because the persons concerned belonged to a certain race, religion, etc., but that the actual reason for the derogation might be otherwise. It was therefore important to emphasize that the evil to be avoided was discrimination based solely on the grounds mentioned. Further, it was considered that reference to the various grounds for non-discrimination set forth in article 2, paragraph 2, of the Universal Declaration of Human Rights would not be appropriate, since legitimate restriction might, in some cases, be imposed on certain categories mentioned therein."

2/ In its general comment 5/13 contained in its annual report to the General Assembly in 1981, the Human Rights Committee places the principle of non-discrimination on the same footing and includes it in the same sentence as the rights from which no derogation is permitted, as follows: "The State party, however, may not derogate from certain specific rights and may not take discriminatory measures on a number of grounds." (Official Records of the General Assembly, Thirty-sixth session, Supplement No. 40 (A/36/40), p. 110).

Annex I

I. SUMMARY TABLES BY STATES

A. South Africa

SOUTH AFRICA 1/

Proclamation, extension or termination	Dates	Duration	Territory	Grounds	Measures taken	Rights concerned
Proclamation of state of emergency	21.7.85		In 36 districts representing 14 per cent of all districts	Circumstances seriously endangering public safety and order, which cannot be adequately upheld by ordinary laws (statements by the President in Parliament and to the press)		
Termination	7.3.86		Ibid.			
"Proclamation" R.108	11.6.86	From 12.6.86	Entire territory			
"Proclamation" R.95 ("Regulations under Public Safety Act of 1953")	10.6.87	From 11.6.87	Ibid.	Ibid.	Powers of arrest and detention vested in the security forces (R.96) Restrictions imposed on reporting by press and audio-visual media (R.97) Powers of control over pupils and over the situation in the schools vested in the Director of Education (R.98)	
Extension of state of emergency	9.6.88	From 10.6.88	Ibid.	Ibid.		
Extension of state of emergency	8.6.89	From 9.6.89	Ibid.	Ibid.		

South Africa (continued)

Proclamation, extension or termination	Dates	Duration	Territory	Grounds	Measures taken	Rights concerned
Lifting of some Emergency Regulations	2.2.90		Entire territory	In view of President de Klerk's policy on "negotiated understanding"	Abolishing of Media and Education Emergency Regulations, lifting of Security Emergency Regulation 7, (R.86 of 1989) including order 1220 (prohibition of certain organizations) limit of period of detention, access to lawyers and doctors	art. 19 CCPR art. 13 CESCR art. 18 CCPR art. 21 CCPR art. 22 CCPR art. 14 CCPR
Proclamation of State of Emergency	8.6.90		Province of Natal including part of self-governing territory of KwaZulu within the boundaries of Natal	Because of "a factual state of emergency which seriously threatens the safety of the public and maintenance of public order and which cannot be countered with the ordinary laws of the land"	Introduction of Regulation 4 (appointment of special advisers) and of R.15 (proof of certain facts)	
Lifting of state of emergency	18.10.90		Province of Natal			

1/ This table contains the information that the Special Rapporteur has been able to verify as at 1 December 1990. Some of it has already appeared in the updated version of his first report, prepared for the Commission on Human Rights (E/CN.4/Sub.2/1987/19/Rev.1, annex I), which was essentially based on reliable information received by the Special Rapporteur from the following non-governmental organizations in consultative status with the Economic and Social Council: Amnesty International, International Commission of Jurists, International Confederation of Free Trade Unions, International Federation of Human Rights, International Defence and Aid Fund for Southern Africa and Rädda Barnen (in particular, a study by Nicholas Haysom, Centre for Applied Legal Studies, University of Witwatersrand, The State of Emergency Law with Special Reference to the Detention of Children, presented at the International Conference on Children, Repression and the Law in South Africa, Harare, 24-27 September 1987, and South Africa, Human Rights and the Rule of Law, published by the International Commission of Jurists, Frances Pinter Ltd., London). This information was communicated to the Government by the Special Rapporteur on 28 July 1988, for any comments or corrections that the Government might wish to make. In his updated second report to the Commission, the Special Rapporteur informed the Commission of his action and of the fact that, according to information appearing in the press, the state of emergency had been extended by the Government on 11 June 1988 (E/CN.4/Sub.2/1988/18/Rev.1, para. 23); see also four relevant publications received by the Special Rapporteur, to which reference is made in annex III of the same document. On 1 September 1988, the Government transmitted to the Chairman of the Sub-Commission on Prevention of Discrimination and Protection of Minorities at its fortieth session a reply to the information communicated by the non-governmental organizations mentioned above and requested that its reply should be circulated as a Sub-Commission document. That was not possible due to lack of time. At the suggestion of the Special Rapporteur, therefore, the Government agreed to have its reply published as an annex to the third report. It was reproduced in document E/CN.4/Sub.2/1989/30/Rev.1 with a few comments drawn from information supplied by the same non-governmental organizations, which the Special Rapporteur has also communicated to the Government. The table has been corrected to take the Government's reply into account. The comments of the non-governmental organizations and the Government's reply were reproduced unchanged. The Government's reply has been communicated to the organizations for comments and clarifications. As at 1 December 1990, the Special Rapporteur had received no replies from those organizations.

COMMENTS

Proclamations, extensions and terminations

The Public Safety Act of 1953: authorizes the President to declare a state of emergency in all or part of the territory (the proclamation cannot be legally challenged; if the state of emergency has not already been lifted, it expires after 12 months) and to terminate it; gives him the power to legislate, when he deems it necessary for the maintenance of public safety or order, through regulations which must be submitted to Parliament within 14 days following their promulgation; enables him to delegate his powers in this area to subordinates through orders or rules. Before 1985, these emergency powers had only been used once, after the events at Sharpeville in 1960.

The Public Safety Amendment Act of 1986 makes the President's obligation to proclaim a state of emergency redundant by authorizing the Minister of Law and Order to declare any area or the entire country to be an unrest area and to apply any regulation he deems necessary to that area. The Minister's declaration expires after three months, but it is renewable indefinitely with the President's authorization.

Successive proclamations or extensions of states of emergency took place in 1985, 1986, 1987 (see E/CN.4/Sub.2/1987/19/Rev.1, annex I), 1988, 1989 and 1990. Since it has not acceded to the International Covenant on Civil and Political Rights, South Africa has no obligation to notify the Secretary-General of the United Nations.

At the opening session of the South African Parliament, on 2 February 1990, President F.W. de Klerk announced the lifting of some emergency regulations in the light of the "growing realization that only a negotiated understanding among the representative leaders of the entire population is able to ensure lasting peace". This included the abolition of the Media Emergency Regulations (R.88 of 1989) as well as of the Education Emergency Regulations (R.89 of 1989) in their entirety and the rescinding of the restrictions on 33 organizations (Regulation 7 (1-5) of R.86 of 1989), as well as a revision of regulation 3: arrest and detention of persons, limiting the period of detention to six months and provision of the right of access to lawyers and medical practitioners by detainees.

Measures taken and rights concerned

Under the delegation of powers provided by the Act of 1953, police chiefs have been able to decide: to prohibit funerals, religious gatherings, the wearing of buttons or clothing, the possession of tyres and entry into or exit from residential neighbourhoods; to impose curfews; to prevent trade-union meetings; to order or prohibit the attendance of children at schools or other institutions. Policemen have therefore governed entire regions, in particular the black townships.

The powers vested in the Government under the "security" laws concerning public gatherings, freedom of movement, prisons, the defence forces, censorship and freedom of the press, provide it with various legal means of controlling any dissidence; these means resemble emergency powers in every way except in name. The emergency measures taken under these powers are designed in particular to exclude all judicial control over their implementation, particularly over measures taken by the police. During declared states of emergency, the President has promulgated regulations along these lines: Regulation 16 (1), which aims at absolving the security forces of responsibility by requiring the plaintiff wishing to challenge an illegal act on their part to prove that the act complained of was not committed in good faith; Regulation 16 (3), or the Ouster Clause, which is designed to exclude any control by the Supreme Court over the emergency powers, regulations, orders or behaviour of the security forces; and Regulation 3 (10), designed to restrict detainees' access to their lawyers.

The measures adopted under the state of emergency declared in 1986 provided, in particular, for the detention of suspects for up to 14 days. On 11 June 1987 the Government adopted a series of "Proclamations" which, inter alia, extended the powers of the security forces in regard to arrest without a warrant (particularly those of the members of the South African Defence Force and other bodies grouped under the name "security forces"), the use of force, detention and the interrogation of suspects. Under these emergency measures, the duration of detention was increased to 30 days, renewable upon the decision of the Cabinet Minister. New regulations on detention were adopted in Proclamation R.106 of 26 June 1987, following an appeal to the Supreme Court of Durban challenging the regulations decreed by the Minister of Justice.

Another objective of the regulations is to prevent the media from reporting on the behaviour of the police or informing the public about conditions of detention, subject to heavy fines or seizure in the case of local publications, or to expulsion in the case of foreign journalists, unless the information quoted comes from the Government Bureau of Information. Regulation 123 of 1987 authorizes the Minister, when he feels that a periodical, by systematically publishing "subversive propaganda" (in favour of revolution, uprisings, boycotts, strikes, etc.), endangers public safety or the maintenance of public order, or might delay the lifting of the state of emergency, to issue it a warning, followed if necessary by a ban on its publication, during a period not to exceed three months, unless publication has been approved by a person to be designated by him.

Various court decisions have annulled detentions ordered under the regulations (see cases Nos. 1074/86, 4988/86, 399/87 and 1167/87) or required grounds for the detention to be presented. Numerous cases have been brought before the Supreme Court and the Appellate Division. The judges held that, despite the Ouster Clause, it was for the judge to determine the validity of the Regulations (Radebe v. Minister of Law and Order, 7 July 1986, Goldstone J.). However, the Appellate Division decided that under the 1953 Act, the President could adopt regulations depriving individuals of fundamental rights recognized by common law, such as the right to be heard when detention exceeds 14 days and the right to see one's legal representative or lawyer. Thus, these fundamental rights do not override Regulation 3 (1), which prohibits anyone from entering into contact with persons detained under the emergency measures unless authorized to do so by the Minister of Law and Order.

On 11 July 1990 the Special Rapporteur received from the Government of South Africa copies of Proclamations R.97 and R.98 of 8 June 1990 containing Security Emergency Regulations and Prison Emergency Regulations respectively.

In deviation from earlier security regulations, the Security Emergency Regulations of 1990 are now drafted for a designated area. The major changes of 3 February 1990, such as limit of detention up to six months (Regulation 3 (3)) as well as access to a medical practitioner and a legal representative (Regulation 3 (8)), are maintained. New is Regulation No. 4 on the appointment of special advisers to the Minister, who can visit detainees and check whether the circumstances of the detention are in accordance with the applicable statutory regulation, and who can compile reports in case of offences in respect of the physical or psychological integrity of the detainee. Regulation No. 15 introduces the concept of "Proof of certain facts", where, in case of proceedings before a court of law on the issue of prolongation of detention, restrictions on activities or prohibition of particular activities, the production of an affidavit by anybody who has been acting on behalf of the Minister of Law and Order, shall be accepted as conclusive proof of the facts stated therein.

The prison emergency regulations have remained unchanged.

Impact on human rights

(a) Right to life

More than 200 children are alleged to have been killed by the security forces. On 22 April 1987, seven striking workers were killed by the police. In August 1987, 10 miners who were trade-union members were killed during confrontations with the police during a strike.

(b) Prohibition of torture

Torture and inhuman treatment are alleged to have been inflicted on children.

Forty-three persons have alleged the use of systematic and intensive torture by the police on hundreds of detainees at Port Elizabeth and at Uitenhage.

Numerous trade unionists arrested under the emergency powers have reported being subjected to brutality and torture.

(c) Other human rights

(Right to be brought promptly before a judge, article 9 of the International Covenant on Civil and Political Rights; right to leave one's country and return to it, article 12; right to be tried without undue delay, article 14; freedom of assembly, article 21; freedom of association, article 22)

A "security law", the Internal Security Act, prohibited for nearly 10 years any meeting of more than two persons in the street, and authorized unlimited detention without trial, access to a lawyer or family visits; other legal provisions make it possible to ban books, persons and organizations. Under Regulation 23 of 1988, the Minister may without warning or prior hearing decide to prohibit an organization (association or group of persons) or a person from conducting any activity, or a specific activity or type of activity.

From 25,000 to 30,000 persons are thought to have been detained for periods of more than 30 days between June 1986 and August 1987, of whom 40 per cent were children under 18 years of age and 554 were trade unionists. Since the Minister of Law and Order may renew the detention order indefinitely, some of these persons were still being detained without charge or trial at the end of 1987, including 322 who were trade unionists. The Internal Security Amendment Act authorizes detention without trial for up to 180 days.

Following the increase in the number of trade-union demonstrations, the Government, through Order 334 of 1988, prohibited 17 of the most important anti-apartheid and civil-rights defence movements from engaging in activity or act.

The passports of certain trade unionists were taken away from them in order to prevent them from participating in international meetings. The police intervened during strikes and carried out arrests and mass deportations in 1987 and early 1988. During the strike of August 1987, more than 250 miners were seriously wounded, more than 200 were arrested and detained and 46,000 were dismissed from their jobs.

B. El Salvador

EL SALVADOR

Proclamation, extension or termination	Dates	Duration	Territory	Grounds	Measures taken	Rights concerned
Suspension of constitutional guarantees	6.3.80	30 days renewable	Entire territory and climate of general violence	Political and social crisis and association, expression,	Suspension of freedoms of movement 19 of the Covenant inviolability of correspondence	Derogations from arts. 12, 17 and
Legislative Decree No. 50	24.2.84	1 year			Decree regulating attacks on the integrity and security of the State in the event of suspension of constitutional guarantees. Permits, inter alia, administrative detention for a period of 15 days, including 8 days of detention incommunicado	
Decree No. 97	17.5.84	30 days	Idem	Termination of temporary easing of restrictions on party political activity	Derogation from arts. 12, 17, 19, 21 (freedom of assembly except meetings of a religious, cultural, economic and sporting nature), 22 (freedom of association with others, except for the right to form and join trade unions)	
Extension of martial law (Legislative Decree No. 322)	18.1.85	Idem	Idem		Derogation from arts. 12, 17, and 19, para. 2 (freedom of expression)	

El Salvador (continued)

Proclamation, extension or termination	Dates	Duration	Territory	Grounds	Measures taken	Rights concerned
Ibid (Legislative Decree No. 368)	23.4.85	Idem	Idem	Serious disturbances of law and order representing a threat to the security of the State and the physical and moral integrity of the population and its property	Suspension of guarantees	Rights covered by arts. 5, 12, para. 2, 13, para. 2 and 24 of the Constitution: freedom to enter, reside in and leave the national territory, rights of detainees to be informed of the reasons for their detention and to be assisted by defence counsel; maximum administrative detention of 62 hours; inviolability of correspondence
Series of decrees	From 23.5.85	Every 30 days	Idem		Extension of state of emergency	Suspension of constitutional right to freedom of expression (art. 6, para. 1)
-	12.1.87			End of state of emergency (CCPR/C/SR.719)		
-	28.2.87			Expiry of Decree No. 50 of 24.2.84		
Legislative Decree No. 618	11.3.87			Criminal Procedure Act applicable in the event of suspension of constitutional guarantees		
Proclamation	12.11.89 12.12.89	12.12.89 12.1.90	Idem Idem			

REMARKS:

Due to the political and social crisis and the climate of general violence prevailing in El Salvador, the Government decreed, on 6 March 1980, the suspension of certain constitutional guarantees (including freedom of residence and movement, freedom of expression and freedom of correspondence). In 1982 and 1984 the restrictions on party political activity were temporarily lifted to permit elections to be held under normal conditions.

In a notification of 31 July 1985, the Government informed the United Nations Secretary-General of the successive extensions of martial law, effected every 30 days by legislative decree, in conformity with the Constitution of El Salvador, between 21 June 1984 and 11 July 1985.

The Government informed the Human Rights Committee at its 719th meeting (CCPR/C/SR.719) that the state of emergency had ended on 12 January 1987 and that persons who had committed crimes against the existence and organization of the State had been tried by military tribunals, in accordance with the procedure specified by Legislative Decree No. 50 of 24 February 1984 (whose application expired on 24 February 1985). See also the commentary of the OAS on this decree (E/CN.4/Sub.2/1987/Add.1, II), regulating attacks on the integrity and security of the State in the event of the suspension of constitutional guarantees.

The Constitution of El Salvador prescribes that unless the decree of suspension is explicitly renewed, constitutional guarantees are automatically restored (art. 29).

In a letter dated 18 August 1989, the Government informed the Special Rapporteur that during the suspension of freedom of expression, despite the legal powers granted by the state of emergency, the suspension was enforced with extreme moderation and tolerance by the authorities because of the democratic process taking place. No state of emergency has been declared from 12 January 1987 to the present. Notwithstanding this, by Legislative Decree No. 618 of 11 March 1987, the Criminal Procedures Act applicable on suspension of constitutional guarantees was passed, for application in future to proceedings conducted during emergency situations and also to cases pending, that were initiated under Decree No. 50 of 24 February 1984. The constitutional basis for this Act is article 30, which provides that when constitutional guarantees have been restored, the military tribunals shall continue to try any cases pending before them and that a special procedural law shall apply. Although it has full legal effect, this procedural law remains inoperative if there is no state of emergency, which is the fundamental prerequisite for its application.

Annex II

LIST OF REPLIES RECEIVED

A. Governments

Algeria	28 April	1989
Bolivia	27 December	"
	8 January	1990
Brunei Darussalam	21 March, 18 August	1989
Canada (Manitoba)	24 August, 18 September	1989
Chile	10 August	"
China	8 May, 15 August	"
Cuba	14 September	"
Cyprus	20 September	"
Czech and Slovak Federal Republic	21 November	"
El Salvador	18 August, 10 November	"
Fiji	6 November, 7 December	"
Finland	1 and 20 September	"
Haiti	16 March	"
Lebanon	28 August	"
Pakistan	24 October, 5 December	"
Peru	4 and 5 January, 7 March, 2 and 10 August, 26 and 31 October, 10 and 29 November	"
	19 January	1990
Portugal	10 August	1989
Saudi Arabia	25 July	"
Senegal	15 January	1990
Singapore	18 August	1989
South Africa	6 July	"
	9 July	1990
Syrian Arab Republic	14 August	1989
Tunisia	15 August	"
Union of Myanmar	16 May, 17 August	"
	26 January, 7 May, 14 June	1990
Venezuela	3 and 18 April	1989
Yemen	15 July and 25 October	"
Yugoslavia	16 May, 15 June and 11 August	"
	30 April	1990
Zimbabwe	10 August	"

B. Competent United Nations bodies

Centre against Apartheid	31 August	1989
Office of the United Nations Disaster Relief Co-ordinator (UNDRO)	10 April	"
Office of the United Nations High Commissioner for Refugees	10 August	"
United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA)	14 August	"

Specialized agencies

International Labour Organisation (ILO)	8 March	1990
	22 June	"

C. Other intergovernmental organizations

Directorate of Human Rights and Directorate of Legal Affairs (Council of Europe)	12 August	1989
Inter-American Commission on Human Rights (OAS)	31 July	"

D. Non-governmental organizations

1. NGOs in consultative status with the Economic and Social Council

Amnesty International	23 August	1989
	June	1990
International Association of Democratic Lawyers	26 April	"
Commission of Churches on International Affairs		"
International Commission of Jurists	14 March	1989
International Confederation of Free Trade Unions (ICFTU)	25 August 5 October	"
International Defence and Aid Fund for Southern Africa	30 August	"
	2 April	1990
International Federation of Human Rights	December	1989
International Federation of Journalists (IFJ)	25 September	"
International Fellowship of Reconciliation		"
International Human Rights Law Group		"
International Institute of Humanitarian Law	8 August	"
International Law Association	13 January	"
International League for Human Rights	28 November	"
International Union of Lawyers	4 August	1989
Inter-Parliamentary Union		"
Minority Rights Group	June	1990
Pax Romana	21 July	1989
Regional Council on Human Rights in Asia	8 August	"

2. Other NGOs

Chilean Foundation for the Protection of Children Affected by States of Emergency (PIDEE)	17 May	"
Permanent Human Rights Assembly of Bolivia	16 November	"
Tibetan Refugee Communities and Tibet Support Groups in Europe	14 August	"
Transnational Perspectives	6 August	"
	26 January	1990

Annex III

LIST OF SPECIALIZED PUBLICATIONS RECEIVED

Amnesty International

- States of Emergency: torture and violations of the right to life under states of emergency. Amnesty International Publications SC/PG/CO/GR, London, July 1988, 32p.;

- Egypt: arbitrary detention and torture under emergency powers. Amnesty International Publications, London, May 1989, 40p. ISBN: 0 86210;

- Egypt: Recent Human Rights Violations Under The State of Emergency. AI Index: MDE 12/07/90. London, October 1990, 16p.;

- Peru: Human Rights in a state of emergency. AI Index: AMR 46/49/89, London, August 1989, 38p.;

- Rapport 1989. Les éditions francophones d'Amnesty International. Paris, 1989, 328p.

Association internationale des juristes démocrates

- Eléments d'information rapportés par la mission d'enquête effectuée dans les territoires occupés par Israël (1-11 June 1989). Bruxelles, 10p.

Bar-Yaacor, Nomi - Human rights in the West Bank and Gaza Strip, 1948-1989. Dissertation submitted to the Faculty of Law, University of Cambridge, Emmanuel College, United Kingdom, 59p.

Blanco, M.L. Ester - Violations of the prohibition of torture in emergency situations. Leyden Journal of International Law, Vol. II, No. 2, 1989, Faculty of Law, Leyden University.

Cardoso, Pedro Paulo - O sistema de emergência: dimensoes jurídico-filosóficas e aspectos constitucionais brasileiros. Maio de 1989, 21p.

Chowdhury, Subrata Roy - The rule of law in a state of emergency. Pinter Publishers, London, July 1989, 288p.

Fédération internationale des droits de l'homme.

Rapport de mission. Israël et Territoires occupés. (2-8.789). Numéro hors série de la Lettre de la FIDH.

O'Donnell, Daniel - Protección internacional de los derechos humanos.

Comisión andina de juristas, capitulo 15 "Estados de excepción", pp. 395-414.

Ressler, E., Boothby, N., Steinbock, D. - Unaccompanied children. Care and protection in wars, natural disasters and refugee movements. Oxford University Press, Oxford, 1988.

Williams, Paul R. - Treatment of detainees. Examination of issues relevant to detention by the United Nations Human Rights Committee. Henry-Dunant Institute, draft copy, 1 June 1989, 136p.

Zovatto, Daniel G. - La protección internacional de los derechos humanos durante los estados de excepción en América Latina, 313p.